



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 17, 2005

Mr. David V. Sorola
City Attorney
City of Del Rio
109 West Broadway
Del Rio, Texas 78840-5527

OR2005-01474

Dear Mr. Sorola:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 218952.

The City of Del Rio (the "city") received a request for eleven categories of information relating to the death of the requestors' son while in the custody of the city police department. You claim that the responsive information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. In addition, you claim that the Bexar County Medical Examiner may wish to withhold a portion of the submitted information. *See* Gov't Code § 552.304 (allowing interested party to submit comments indicating why requested information should or should not be released). We have considered the exceptions you claim and reviewed the submitted documents, photographs, and video tape.

Section 552.103 of the Government Code provides as follows:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The city must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.¹ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You state that the city “is currently not a party to litigation involving this matter, but the City expects to be sued by the family [of the deceased] and therefore may be a party to litigation in the near future.” You further explain that the city believes it will be sued “simply by virtue of the fact that [the deceased] died while in police custody.” The city also informs us that the uncle of the deceased is an attorney licensed in Texas who has spoken with the city’s Chief of Police concerning the death of his nephew. Based on your representations, we do not find that the city has met its burden of showing that litigation is reasonably anticipated.

¹In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

Thus, the city may not withhold any of the responsive information under section 552.103 of the Government Code.

We turn now to your claims under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You claim that the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8, may except a portion of the submitted information from disclosure. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* HIPAA, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 ("Privacy Rule"); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

This office recently addressed the interplay of the Privacy Rule and the Public Information Act (the "Act"), chapter 552 of the Government Code. *See* Open Records Decision No. 681 (2004). In that decision, we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted that the Act "is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public." *See* Open Records Decision No. 681 at 8 (2004); *see also* Gov't Code §§ 552.002, .003, .021. We therefore held that disclosures under the Act come within section 164.512(a) of title 45 of the Code of Federal Regulations. Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. Open Records Decision No. 681 at 9 (2004); *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the city may withhold requested protected health information from the public only if an exception in subchapter C of the Act applies.

Some of the records at issue are medical records, access to which is governed by the Medical Practices Act ("MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

When a patient is deceased, his personal representative may consent to the release of his records. Occ. Code § 159.005(a)(5). This consent must be written and signed by the personal representative and must specify (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked the documents to show which are medical records subject to the MPA.

We note, however, that the MPA defines a patient as a person who consults with or is seen by a physician to receive medical care. Occ. Code § 159.001. Based on this definition, a deceased individual cannot be a "patient" under section 159.001 of the MPA. Thus, section 159.002 protects only the medical records of people who were alive at the time the records were created. In this instance, some of the records at issue relate to a deceased individual and were created *after* the individual's death. Thus, because records created after an individual's death do not constitute "record[s] of the identity, diagnosis, evaluation, or treatment of a patient by a physician," these records are not subject to the MPA and may not be withheld on that basis.

Access to EMS records is governed by the provisions of the Emergency Medical Services Act, Health and Safety Code sections 773.091–.173. *See* Open Records Decision No. 598 (1991). Section 773.091 provides:

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

This confidentiality "does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency

medical services.” *Id.* § 773.091(g). Confidential EMS records may be released to “any person who bears a written consent of the patient or other persons authorized to act on the patient’s behalf.” Health & Safety Code § 773.092(e)(4). When a patient is deceased, his personal representative may consent to the release of his records. Health & Safety Code § 773.093(a); *see also* Open Records Decision No. 632 (1995) (defining “personal representative” for purposes of EMS Act). This consent must be written and signed by the patient, authorized representative, or personal representative and must specify (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Health & Safety Code § 773.093(a). Section 773.093(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Therefore, if section 773.092 applies, the city must release the EMS records to the requestor. *See* Health & Safety Code §§ 773.092, .093; Open Records Decision No. 632 (1995). Otherwise, the city must withhold the EMS records under section 552.101 of the Government Code to the extent that they are made confidential by section 773.091(b) of the Health and Safety Code. *See* Health & Safety Code § 773.091(g) (stating confidentiality of EMS records “does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services”).

Included among the documents you seek to withhold is an accident report form that appears to have been completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer’s accident report). Section 550.065(b) of the Transportation Code states that except as provided by subsection (c), accident reports are privileged and confidential. Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. Transp. Code § 550.065(c)(4). Under this provision, the Department of Public Safety or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute. *Id.* In the situation at hand, the requestors have not provided the city with two of the three pieces of information. Thus, you must withhold the marked accident report under section 550.065(b).

Section 552.130 of the Government Code excepts from public disclosure information that relates to:

- (1) a motor vehicle operator’s or driver’s license or permit issued by an agency of this state;
- (2) a motor vehicle title or registration issued by an agency of this state; or
- (3) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document.

Gov't Code § 552.130(a). We have marked the Texas license plate number and vehicle identification number that must be withheld from the public under section 552.130. This provision was enacted to protect the privacy of individuals. We note, however, that a person's right of privacy terminates upon death. *See Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref'd n.r.e.); *see also Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146- 47 (N.D. Tex. 1979); Attorney General Opinion H-917 at 3-4 (1976); Open Records Decision No. 272 at 1 (1981). Therefore, the city may only withhold the marked license plate and vehicle identification numbers if the vehicle at issue pertains to a living individual. If this information pertains only to a deceased individual, it may not be withheld under section 552.130.

Lastly, the submitted information contains bank account and credit card numbers. Section 552.136 of the Government Code states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov't Code § 552.136. The city must, therefore, withhold the marked bank account and credit card numbers under section 552.136. As noted above, however, a person's right of privacy terminates upon death. *See id.* Thus, pursuant to section 552.136, the city must withhold the marked credit card and account numbers only if the accounts are jointly owned by the deceased and a living person who is a joint holder of the account. Otherwise, the city must release the credit card and account numbers.

In summary, if section 773.092 of the Health and Safety Code applies, the city must release the EMS records to the requestor. Otherwise, with the exception of the information required to be released under section 773.091(g) of the Health and Safety Code, the city must withhold the marked EMS records under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code. Medical records can only be released in accordance with the MPA. The city must withhold the marked accident report under section 552.101 of the Government Code in conjunction with section 550.065(b) of the Transportation Code. We have marked the Texas motor vehicle information that must be withheld under section 552.130 of the Government Code if the information pertains to a living individual. If the motor vehicle information pertains only to a deceased individual, it must be released. Finally, we have marked the submitted credit card and account numbers that must be withheld under section 552.136 of the Government Code only if the accounts are jointly owned by the deceased and a living person who is a joint holder of the account. The remaining responsive information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the

governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

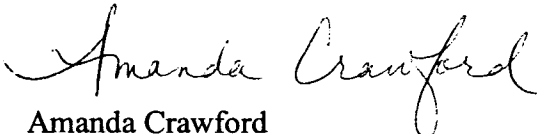
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "Amanda Crawford". The signature is written in dark ink and is positioned above the printed name and title.

Amanda Crawford
Assistant Attorney General
Open Records Division

AEC/sdk

Ref: ID# 218952

Enc. Submitted documents

c: Martin & Gloria Garcia
106 Siesta Circle
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(w/o enclosures)